

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

SEP 11 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

ROBERT F. SNYDER,

Appellant.

)
)
) 2 CA-CR 2011-0397
) DEPARTMENT B
)

) MEMORANDUM DECISION

) Not for Publication

) Rule 111, Rules of
) the Supreme Court
)

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201100045

Honorable Wallace R. Hoggatt, Judge

AFFIRMED IN PART; VACATED IN PART

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Robert Snyder was convicted of four drug-related offenses. He was sentenced to aggravated, concurrent prison terms, the longest of which was 23.1 years. On appeal, Snyder contends the trial court fundamentally erred in failing sua sponte to vacate his convictions for possession of a narcotic drug for sale and possession of a narcotic drug, because they are lesser-included offenses of transportation of a narcotic drug for sale, of which he was also convicted. The state acknowledges the error and, for the reasons that follow, we agree.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Snyder's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On January 5, 2011, Officer Michael Mitchell, a canine handler and narcotics investigator with the Sierra Vista Police Department, stopped a white pickup truck for traffic violations. As the truck pulled over, Mitchell noticed the male passenger, later identified as Snyder, "lift[] his waist up . . . in the seat" and move his left hand behind his back as though "he was trying to conceal something or put something behind him or inside of his pants."

¶3 Concerned for his safety, Mitchell asked Snyder to step out of the truck. Snyder complied, denied having any weapons, and consented to a pat-down search of his person. When Mitchell did not find any weapons, he suspected that Snyder was "trying to conceal another form of contraband." After additional officers arrived at the scene, Mitchell had his canine sniff the exterior of the truck, and the dog alerted to an odor of drugs on the passenger side where Snyder had been seated. The canine also alerted to the

passenger seat during a sniff of the vehicle's interior. Snyder denied having any drugs, and the officers did not find any during their search of the truck. Officers then transported Snyder to the police station and obtained a warrant to search his person. After the warrant had been issued but before it was served and executed, Snyder told the officers that he had between five and six grams of heroin hidden inside his anal cavity. The officers served Snyder with the search warrant and allowed him to remove the heroin himself. The heroin later was determined to weigh just over eight grams.

¶4 Snyder was charged with transportation of a narcotic drug for sale, possession of a narcotic drug for sale, possession of a narcotic drug, and possession of drug paraphernalia. He was convicted as charged and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶5 Snyder argues that his convictions for possession of a narcotic drug for sale and possession of a narcotic drug violate his constitutional right to be free from double jeopardy and must be vacated because they are both lesser-included offenses of transportation of a narcotic drug for sale. Because Snyder did not object to the convictions below, we review his claim for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (“To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.”). Moreover, we review de novo whether

Snyder's double jeopardy rights have been violated. *See State v. Brown*, 217 Ariz. 617, ¶ 12, 177 P.3d 878, 882 (App. 2008).

¶6 A defendant's constitutional rights against double jeopardy offer protection from multiple convictions and punishments for the same offense. *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 773 (App. 2008); *see also* U.S. Const. amend. V; Ariz. Const., art. II, § 10. A double jeopardy violation occurs even if concurrent sentences are imposed for the convictions because an additional felony conviction constitutes punishment. *Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d at 882. A conviction that violates a defendant's double jeopardy rights constitutes fundamental error. *State v. Burdick*, 211 Ariz. 583, ¶ 5, 125 P.3d 1039, 1041 (App. 2005). In determining whether offenses are the same for purposes of double jeopardy, we analyze the elements of the offenses, not the facts of the case. *State v. Siddle*, 202 Ariz. 512, ¶ 10, 47 P.3d 1150, 1154 (App. 2002).

¶7 The state acknowledges Snyder's convictions and sentences for possession of a narcotic drug for sale and possession of a narcotic drug should be vacated because they are lesser-included offenses of his conviction for transportation of a narcotic drug for sale. We agree. A lesser-included offense is an offense "composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). The state may charge both lesser-included and greater offenses, *Merlina v. Jejna*, 208 Ariz. 1, ¶ 19, 90 P.3d 202, 206 (App. 2004), but a defendant may not be convicted for both, *State v. Welch*, 198 Ariz. 554, ¶ 13, 12 P.3d

229, 232 (App. 2000). And, in *State v. Cheramie*, 218 Ariz. 447, ¶ 22, 189 P.3d 374, 378 (2008), our supreme court held possession of dangerous drugs is a lesser-included offense of transportation for sale. The court reasoned that it is inconceivable a person could “‘transport’ drugs without having possession of or dominion or control over them.” *Id.* ¶ 11; *see also State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 13, 965 P.2d 94, 97 (App. 1998) (possession of marijuana for sale lesser-included offense of transportation of marijuana for sale). To cure the error, we vacate Snyder’s convictions and sentences for possession of a narcotic drug for sale and possession of a narcotic drug.¹ *See Welch*, 198 Ariz. 554, ¶ 13, 12 P.3d at 232.

Disposition

¶8 Based on the foregoing, Snyder’s convictions and sentences for possession of a narcotic drug for sale and possession of a narcotic drug are vacated. His convictions and sentences for transportation of a narcotic drug for sale and possession of drug paraphernalia are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

¹Because we vacate the lesser-included convictions, we need not address Snyder’s additional argument that the trial court fundamentally erred by misstating the law in the jury instructions for those offenses by requiring proof that he possessed a “usable quantity” of heroin. *See State v. Bocharski*, 218 Ariz. 476, n.20, 189 P.3d 403, 426 n.20 (2008) (declining to address additional issues as moot). This argument is meritless in any event because Snyder cannot prove prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Here, the instructions did no more than cause the state to prove an additional element not required by the statute. *See A.R.S. § 13-3408(A)(1), (2)*; *see also Cheramie*, 218 Ariz. 447, ¶ 21, 189 P.3d at 378 (“usable quantity” not element of possession offense or necessary for conviction).

CONCURRING:

/s/ *Virginia C. Kelly*

VIRGINIA C. KELLY, Judge

/s/ *Philip G. Espinosa*

PHILIP G. ESPINOSA, Judge